SUPREME COURT OF THE UNITED STATES.

No. 134.—October Term, 1920.

The Oregon-Washington Railroad and Navigation Company, Appellant, *vs.* The United States. } Appeal from the Court of Claims.

[March 7, 1921.]

Mr. Justice McKenna delivered the opinion of the Court.

This action brought by appellant is for the recovery of certain balances amounting to the sum of $4,288.01 being the difference between the amounts paid at certain rates for transportation of the effects of Army officers changing stations and those which it is alleged were legally chargeable.

The Court of Claims adjudged that appellant was not entitled to recover and dismissed its petition. The cost of printing the record in the case was awarded to the United States.

There were findings of fact which show that the rates were presented for payment to the proper accounting officers of the Government in the regular way and payments were made by the disbursing officers of the Government on vouchers certified to be correct and presented by appellant. The rates so presented and paid were at rates for such transportation over land-grant roads fixed in certain agreements known as the "Land-grant equalization agreements" by which, to quote from the findings, "the carriers agreed, subject to certain exceptions, not material to be noted, to accept for transportation all property moved by the Quartermaster Corps, United States Army, and for which the United States is lawfully entitled to reduced rates over land-grant roads, the lowest net rates lawfully available, as derived through deductions account of land-grant distance from a lawful rate filed with the Interstate Commerce Commission from point of origin to destination at time of movement." That is, such freight was accepted by the carriers without prepayment of the charges therefor upon the basis of the commercial or tariff rates with appropriate deductions on account of land-grant distance as provided in the

Railroad Land-grant Acts. It is manifest, therefore, that the commercial rates were higher than the land-grant rates, and this action is to recover the difference between them and the land-grant rates presented for payment, as we have said, by appellant, and paid by the transportation officers of the Government.

After stating the action to be "for the recovery of various amounts aggregating $4,288.01, in addition to those paid on account of 176 items of freight transportation furnished to and paid for by the United States" the Court by Mr. Justice Downey said, the action "is for a sum as to each item of transportation in addition to that already claimed and paid as claimed for the same items and is not for any other or different or additional service nor for omitted items". And further, "the case therefore involves not only the question of the applicability of land-grant rates to this class of freight transportation, a question already decided adversely by this court, but it involves further questions as to the right, under the circumstances of the case, to now recover amounts not then claimed".

The decision referred to is *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 50 Ct. Cls. 412, and the ground of its ruling was that the freight transported was not the property of the United States, it being the effects of Army officers and, therefore, was not entitled to land-grant deductions but was subject to the commercial tariff. Necessarily, therefore, the pending case must turn on other questions for the property transported was the property of Army officers and subject, therefore, independently of other considerations, to the commercial rates. Appellant in the present case was paid sums less than those rates and there is left for consideration only its present right to recover the difference between them and the land-grant rates, the latter being those that were paid.

The Government, however, is not inclined to that limitation of the issue, and attacks the ruling of which it is the consequence, and repeats the contention decided against it in that case, and again insists that the property transported was Government property and entitled to land-grant rates and all else is irrelevant. To this appellant replies that the Government did not appeal from the decision and must be considered as having accepted it. The effect is rather large to attribute to mere non-action, but we need not make further comment upon it because we think the decision

of the Court of Claims was correct. The personal baggage of an officer is not property of the United States and as such entitled to transportation at land-grant rates, and we are brought to the grounds of recovery urged by appellant.

There are reasons for and against them. The assertion is of a right of action and recovery against apparently a concession during a long course of years to an explicit and contrary assertion by the Government. Appellant attempts to explain the concession or, let us say, its non-action, as the compulsion of circumstances, and of a belief of the futility of action, and now urges that it never intended to relinquish but always intended to assert its right. The record, however, has much against this explanation, or that can be accommodated to it, if we may ascribe to appellant the usual impulses and interest that influence men.

It "and its predecessor company, whose properties, franchises, and accounts it acquired, charged upon its books" the transportation charges at land-grant rates and not at regular commercial rates, so rendered its bills to the Government, and received payment without protest or the assertion of a greater compensation. And there was prompting to protest and such assertion. In 1904, according to a finding, "the Union Pacific stated a claim against the United States at regular tariff rates for transportation of household goods and professional books of an officer of the Army over the railroad bridge at Quincy, Illinois." The claim was disallowed and thereafter the Union Pacific stated its accounts at land-grant rates. It is also found that in 1891 and in 1904 there was conversation between the Comptroller of the Treasury and counsel in regard to the rulings of the Comptroller though not, the Court of Claims says, to a claim then pending before the officer. Appellant, however, was not stirred to either opposition or protest by the incident with the Union Pacific or the conversation with the Comptroller but continued to render its accounts at land-grant rates, and accepted payment without opposition or action until the decision of the Court of Claims in *Chicago, Milwaukee & St. Paul Railway Co.* v. *United States, supra.*

Counsel seem to make a merit of this uncomplaining and unresisting acquiescence and observe that the Government by it obtained the advantage of the plea of the statute of limitations. The fact is significant. It is inconsistent with the reservation of a right and an intention to subsequently make a judicial assertion

of it. Creditors are not usually so indulgent and the appellant had remedies at hand. The courts were open to it, certainly protest was open to it. Its explanation for this non-action is not satisfactory. "It is advised and believes", is its allegation, and now its contention, that "its auditors and agents were led and constrained to render its bills and vouchers . . . at tariff rates with land-grant deductions, because the shipments were for the Quartermaster's Department and upon *Government* bills of lading which in terms are only applicable to 'Government property' and 'public property', *and also (because) The Comptroller of the Treasury (whose decisions are by law made final and controlling upon the Executive Departments of the Government) had held that such transportation, upon Government bills of lading, when within the amount authorized to be transported by Departmental regulations at the expense of the Government, was quasi-public property and entitled as such to land-grant rates*", and that it did not intend to waive its right to payment in full or to sue, "if so advised" for the balances due "so far as the same were not barred by the statute of limitations."

The italics are counsel's and we repeat them as they give emphasis to counsel's conviction of the justification of the excuse. We do not share it. The mere mechanism of the bills of lading or their false designations of the property transported could not have imposed on anybody, certainly not on "the auditors and agents" of a railroad company, and the decisions of the Comptroller were as much open to dispute then as now and resort to suit an inevitable prompting, and yet, we have seen, the statute of limitations was permitted to interpose its bar. The excuse of appellant is hard to credit. Its "auditors and agents" were not ignorant of affairs, nor unpractised in the controversies of business, and the means of their settlement. The auditors and agents of railroad companies are not usually complaisant to denials of the the rights of the companies they represent. We do not say this in criticism, for such is their duty, the necessary condition of their places.

We are forced, therefore, to conclude that appellant's non-action was deliberate, based upon a consideration of its advantages, with no thought of ultimate assertion against the decision of the Government until stirred to acquisitiveness by the decision in the

Chicago, Milwaukee & St. Paul case, a decision which we may say in passing, was declared by the Court of Claims to have been improvidently given. *B. & O. R. R. Co.* v. *United States*, 52 Ct. Cls. 468.

The case therefore falls within the rulings of *United States* v. *Bostwick*, 94 U. S. 53; *Baird* v. *United States*, 96 U. S. 430; *Railroad Company* v. *United States*, 103 U. S. 703; *Central Pacific Ry.* v. *United States*, 164 U. S. 93. And they have supplemental force in *United States* v. *Edmondston*, 181 U. S. 500; *Untermehle* v. *Norment*, 197 U. S. 40.

These views lead to an affirmance of the judgment upon the record as it now stands. It should be said, however, that they are based on the concessions of appellant to the action of the accounting officers, and the Court of Claims makes this a point in its decision. The Court said that from the "long continued uniform course of action by" appellant "for a long period of years", "it had no intention of claiming anything more as to these transactions than that claimed in the certified vouchers and paid." And added, "All the facts justify this conclusion, for a course of conduct is more potent than assertions of belief enacted on. But if such a conclusion were otherwise subject to question it appears from the evidence that plaintiff's (appellant) charge upon its books was only of the amount claimed in its vouchers and that when that amount was paid 'the transaction was behind us.' The quoted language is the language of plaintiff's auditor."

In explanation of this, it may be said, and in contradiction of its implication, appellant requested findings by the court that the transaction of the appellant and its predecessor company "was regarded by the auditing department of the company as closed, so far as they were concerned, but as subject to subsequent adjustment or suit in court if subsequently found to be incorrect." And further, that the Government considered the accounts between "the carriers as in the nature of running accounts, subject to correction as the occasion arises, in the light of the law and the facts." And it is contended that the evidence supports such conclusion. This is disputed by the Government, and it is doubtful. The Government concedes that a motion to remand the case for additional findings has foundation in the record but contends "that

the requests are without merit and that the case is fully covered by the facts found." And adds, "of course, in so far as the motion tends to request the Court of Claims to change findings made it is futile, as the findings are conclusive."

The Government further urges that the proposed amendment to Finding VI is covered by Findings VI and IX, and is only a request "to change a negative to a positive finding"; that the amendment to Finding X is "rather an argument that certain conclusions should follow from facts found" and that "its conclusion, from the facts found, is that both parties regarded the settlements as final, not as tentative." The amendment to Finding XI, is, the Government says, "a request to find evidence" which is contrary to the rules, and besides the evidence is immaterial.

We concur with the Government that the request for findings is an effort to change negative to positive findings. The reasoning of the court expresses implicitly, if not explicitly, a view contrary to that expressed in the request. In other words, the court regarded the settlements of appellant with the Government as final, and not as tentative.

Judgment affirmed.

Mr. Justice PITNEY and Mr. Justice CLARKE concur in the result.

A true copy.

Test:

Clerk Supreme Court, U. S.